IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-4.

IN RE SUGAR ANTITRUST LITIGATION (MDL NO. 201).

The Amalgamated Sugar Company, Amstar Corporation, California Beet Growers Association, Ltd., The Great Western Sugar Company, and U and I Incorporated,

Petitioners,

v.

United States District Court for the Northern District of California,

Respondent.

Anthony J. Pizza Food Products Corporation, et al., (Civil No. C75-1123, et al.)

Real Parties in Interest.

BRIEF ON BEHALF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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BRIEF ON BEHALF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondents, the Real Parties in Interest herein, oppose the Petition for Writ of Ceriorari. This Petition seeks review of the denial by the Court of Appeals for the Ninth Circuit of a petition for a writ of mandamus, under 28 U. S. C. Section 1651, to review an order of the district judge refusing to disqualify himself under 28 U. S. C. Sections 144 and 455(a).

PROCEEDINGS BELOW.

I. Proceedings in the District Court.

On May 20, 1976, the district court certified certain actions to proceed as class actions. *In Re Sugar Industry Antitrust Litigation* (MDL 201), 1977-1 CCH Trade Cases ¶ 61,373 (N. D. Cal. 1976). Several, but not all, defendants requested the district court to certify an interlocutory appeal of its class certification order pursuant to Title 28 U. S. C. Section 1292(b). After extensive briefing the district court denied defendants' request.

On October 8, 1976, certain defendants filed a motion requesting that the district judge disqualify himself, under 28 U. S. C. Sections 144 and 455 (Petitioners' Appendix C, p. 1). On December 6, 1976, Judge Boldt denied the motion (Petitioners' Appendix B, p. 10a).

II. Proceedings in the Court of Appeals.

Certain defendants, petitioners herein, filed (a) an appeal from the class certification order of the district judge, under Title 28 U. S. C. Section 1291, and (b) a petition for a writ of mandamus ordering the district judge to vacate his order certifying the classes. The Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction on January 28, 1977 (Appendix, p. A1), denied a petition for rehearing on June 6, 1977 (Appendix, p. A2) and denied the petition for writ of mandamus on June 7, 1977 (Memorandum Order, Appendix, p. A4), as well as various motions for stay orders. Petitioners requested an extension of time to petition for rehearing which was granted on June 27, 1977 (Appendix, p. A9).

On January 17, 1977, petitioners also filed a petition for writ of mandamus in the Court of Appeals for the Ninth Circuit seeking review of the district judge's order refusing to disqualify himself, which petition was denied on February 21, 1977 (Petitioners' Appendix B, p. 9a.)

PROCEEDINGS IN THIS COURT.

After requesting and being granted an extension of time within which to file a petition for a writ of certiorari, on June 30, 1977 petitioners filed their petition for a writ of certiorari pursuant to 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals correctly apply established legal precepts in denying a petition for a writ of mandamus to review the district judge's order refusing to disqualify himself under 28 U. S. C. Section 144 where:

(a) The district judge showed no personal bias or prejudice against or in favor of any party.

(b) The affidavits submitted by petitioners were based on hearsay and conjecture, and were legally insufficient to require disqualification of a district judge;

(c) The affidavits were not timely filed, and were barred by the applicable statutory provision and laches?

2. Did the Court of Appeals correctly apply established legal principles in denying a petition for a writ of mandamus to review the order of the district judge refusing to disqualify himself, under 28 U. S. C. Sections 144 and 455, where the Judge, applying the correct legal standard, after considering all of the memoranda and affidavits submitted to him, determined that his impartiality was not being reasonably questioned?

3. Did the Court of Appeals correctly apply established legal principles in denying a petition for a writ of mandamus seeking review of the order of the district judge refusing to disqualify himself, where petitioners' arguments were based entirely on their own attacks on the trial court judge, and there was nothing in the record to substantiate the charges?

STATEMENT OF THE CASE.

I. Nature of the Case.

These consolidated proceedings have been brought by private business entities and governmental entities against sugar processors and two trade associations, five of whom are petitioners herein, for violations of the federal antitrust laws. The actions were filed subsequent to two federal criminal indictments and three accompanying federal civil complaints against various defendants. On July 2, 1975, the Judicial Panel on Multidistrict Litigation transferred many of these actions to the Northern District of California before the Honorable George H. Boldt, a Senior Judge for the Western District of Washington, sitting by special designation. *In Re Sugar Industry Antitrust Litigation,* 395 F. Supp. 1271 (J. P. M. L. 1975) (MDL 201). Additional actions have been filed in or transferred to the Northern District of California and assigned to Judge Boldt.

The Complaints allege that defendants conspired to, and did, fix the prices of refined sugar and molasses and allocated customers and territories, causing plaintiffs to pay higher prices for sugar than they would have paid absent the conspiracy, in violation of Section 1 of the Sherman Act, 15 U. S. C. Section 1. The plaintiffs seek damages and injunctive relief under 15 U. S. C. Sections 4, 16.

This matter has been before the Court of Appeals at the behest of defendants on at least three equally frivolous occasions. No question or conflict exists to be resolved by this Court. The questions presented in support of the Petition are totally without merit.

Question No. 2 reads: "Is mandamus the appropriate remedy to review an order of a district judge refusing to

disqualify himself when sufficient grounds have been presented by the moving parties?" However, that is not an issue in these proceedings. The Court below did not dismiss the Writ upon the ground that mandamus was not the appropriate remedy, as a comparison of the language in the Orders in those three proceedings clearly demonstrates. The inclusion in the Petition of Question No. 2 is simply an attempt to bolster a Petition which has no merit.

In the proceedings in the Court of Appeals for the Ninth Circuit, No. 76-3303, *"In Re: Sugar Antitrust Litigation,* MDL No. 201, *Baldi Candy Company, et al.,* Plaintiffs-Appellees *v. The Amalgamated Sugar Company, et al.,* Defendants-Appellants," the Court disposed of an appeal under 18 U. S. C. § 1291 from the class determination for lack of jurisdiction, specifically stating: "Upon due consideration of the motion to dismiss, the appeal is dismissed for lack of *jurisdiction. Blackie v. Barrach,* 524 F. 2d 891 (9th Cir. 1975)." (Emphasis added). (Appendix, p. A1).

Defendants filed a Petition for Rehearing. The Ninth Circuit, in an Order filed June 6, 1977, rejected defendants argument that it was thereby adopting a "per se rule of *non-appealability* of class certification orders" and discussed the appealability decisions of other circuits. (Emphasis added). (Appendix, p. A2).

On the other hand, in No. 76-2919, a mandamus to set aside the district court's class determinations *"In Re Sugar Antitrust Litigation,* MLD No. 201, *American Crystal Sugar Co., et al., Petitioners v. U. S. District Court For The Northern District of California, Respondent, Anthony J. Pizza Food Products Corp., et al., Real Parties In Interest,"* the Court of Appeals made no statement with respect to the propriety of mandamus, but did deny the Petition

on the merits because the district court had not abused its discretion. (Appendix, p. A4).

Here, in No. 77-1144, *In Re Sugar Antitrust Litigation,* MDL No. 201, *The Amalgamated Sugar Company, et al., Petitioners v. United States District Court For The Northern District Of California, Respondent, Anthony J. Pizza Food Products Corp., et al., Real Parties In Interest,* the Court of Appeals stated: "Upon due consideration, the petition for writ of mandamus is denied." The Court did not mention lack of jurisdiction or any other procedural impediment. (Petitioners' Appendix B, p. 9a).

Turning next to the only other question posed by Petioners, in support of the petition, which is in two parts, the district court did not apply an erroneous legal standard, and the standard it applied in no way is inconsistent with the standard applied by the Court of Appeals or this Court. The district court simply decided, applying those standards, as set forth more fully herein, that there was no reasonable ground, even assuming the allegations by defendants to be true, upon which its impartiality might reasonably be questioned. (Memorandum Decision re: Disqualification, Petitioners' Appendix B, p. 10a). The Court of Appeals agreed.

II. Allegations Set Forth in the Petition for Certiorari.

Petitioners' contention that Judge Boldt's alleged friendship with William H. Ferguson, one of more than fifty counsel for plaintiffs, and Chairman of the 19 man Plaintiffs' Steering Committee, requires disqualification is totally without merit. They are not former partners or relatives, and there is no allegation whatsoever of any "close personal" relationship of any kind between Mr. Ferguson and Judge Boldt, other than that they practiced as opponents at the same bar prior to Judge Boldt's appointment to the Federal Bench, and are friends.

Petitioners extended effort to suggest judicial bias by alleging that Mr. Ferguson had originally opposed consolidation of the *1812* case pursuant to 28 U. S. C. Section 1407, and later consented to it is inconsequential. Mr. Ferguson's decision with regard to consolidation was reached after weighing all of the relevant considerations. The *1812* case had been pending approximately two years prior to consolidation. Consolidation provided the opportunity for a joint effort with a large number of additional experienced antitrust counsel.

Petitioners' contention that Judge Boldt "appointed" Mr. Ferguson the Chairman of the Plaintiffs' Steering Committee is both incorrect and immaterial. Mr. Ferguson stated on the record at the outset of the first pretrial hearing conducted by the district court that he was acting as Chairman of the plaintiffs' group (Petitioners' Appendix C, p. 623). Judge Boldt acknowledged on the record, that day, that Mr. Ferguson was acting as Chairman (Petitioners' Appendix C, p. 719). He made it clear on the record that he had not appointed any executive committees, steering committees or leaders, acknowledging that, while he had the authority to do it, it was his practice to allow counsel involved to select their own leaders. The district court only approved what counsel had agreed upon (Petitioners' Appendix C, p. 914). Of course, even if Judge Boldt had appointed a Chairman of the Plaintiffs' Steering Committee, such appointment would not serve as any ground for disqualification. In fact, the *Manual For Complex Litigation* § 1.92 (1973), permits the district court to make such appointments, and many Judges do so, some confirming the selection by all counsel, and others making their own designation.

The assertion that the district court was informed of certain settlements between the plaintiffs and some defendants, and that such information constitutes a ground

for disqualification, is similarly immaterial and incorrect. Defendants have not indicated any authority which would support a restriction on communications with respect to settlement to a judge before whom litigation is pending or require that a judge thus informed be disqualified. Indeed, many judges insist upon participating in settlement negotiations while continuing to supervise the litigation against the same or other parties. For example, in the *Folding Carton Antitrust Litigation* (MDL. 250), certain defendants requested that one judge be assigned as a trial judge, and another judge be assigned as "settlement judge". The Judicial Panel on Multidistrict Litigation rejected this suggestion and assigned both judges to supervise *all* aspects of the pending litigation in that complex antitrust case (Appendix, p. 10). Fed. R. Civ. P. No. 16 for many years listed settlement negotiations as a subject to be considered at pretrial conference.

There is not one statement or assertion to the effect that Judge Boldt ever read the settlement agreements prior to the determination of the class motions. To the contrary, the record is replete with statements indicating that the district court meticulously avoided reading the terms of the proposed settlements with certain defendants until after his order on class motions had been entered, reconsidered and affirmed.

At the close of the hearing on December 9, 1975, to which Petitioners refer, the district judge stated that he wanted to get the views of the parties concerning what, if anything, he should do with respect to the proposed settlements that had been mentioned to him (Petitioners' Appendix C, p. 886). The following day, in open court, the district judge sought to relieve the minds of all the parties concerning any possible impropriety that might exist because of the delivery to him of a document which

contained a copy of the proposed settlement. Judge Boldt stated, on the record, that the chief counsel for Amstar knew first hand that the judge had only received such document that prior morning, and had had no time to read it except to scan the title prior to being asked by defendants not to consider the proposed settlement before ruling on the class issue. The district judge then stated that the documents remained the way that he had received them, and that he was not going to look at them again until an appropriate time came when all could agree that it would be proper for him to do so. Defendants did not contest these facts at the December 9-10, 1975 pretrial hearing. Judge Boldt further assured the parties that no settlement would be considered until after the ruling on class motions (Petitioners' Appendix C, p. 895-896). In fact, the district court was unaware of the specific provisions of the settlement until counsel for the defendants chose to inform him of certain provisions during argument (Petitioners' Appendix C, p. 906). As a final assurance to the parties concerning possible prejudice from the consideration of any proposed settlement, the district judge informed the parties that he would not accept any information about the settlements until presented by both sides, pursuant to the customary practice to put in motion the Fed. R. Civ. P. 23 procedures for approval of class settlement (Petitioners' Appendix C, p. 922).

Plaintiffs' Coordinating Counsel filed with the Clerk of the District Court on December 5, 1975 the original Holly Settlement Agreement, which was attached to the Request for Establishment of a Schedule for Consideration of the Proposed Settlement. That document was filed prior to the Pretrial Conference on December 9-10, 1975, before the non-settling defendants had voiced any objection to the district court's receiving a copy of the proposed settlement agreement, and prior to transmittal to that court. Accordingly, it was not actually literally filed under "seal" with the Clerk. However, Judge Boldt stated informally in chambers on December 9, 1975, and on the record of December 10, 1975, that he had not read the contents of the Settlement Agreement (Petitioners' Appendix C, pp. 895-896). Nowhere is it suggested that the district judge ever did otherwise but abide by his statement. The fact that actual filing of the settlement with the Clerk was not under a technically defined seal is immaterial. The district court's use of the word "seal" at the *Fertilizer* hearing is insignificant and irrelevant since whether the Agreement was under "seal" at the Clerk's office is immaterial, even by defendants' reckoning, as long as it was not read by the district court.

Petitioners further argue that Judge Boldt must have read the *Holly* settlement papers because he certified classes along the lines of those contemplated in the settlement papers. This reasoning falters, however, since the classes established vary from those contemplated in the *Holly* agreement in material respects: i.e., the district court granted state governmental entity classes only in those instances where the state had brought an action in its own name, whereas the settlement contemplated that the named state plaintiffs would act as representative parties for the public entities in other states which had not brought actions. The district court modified the contemplated class of retail grocery stores by not establishing a level of minimum purchases such as was anticipated in the *Holly* papers. The principal class not certified, indirect consumer purchases, was vigorously opposed by defendants themselves. *In Re Sugar Antitrust Litigation, supra.*

Finally, when certain plaintiffs requested the district court to certify classes of Eastern purchasers who bought from Western defendants, defendants adamantly opposed

the request, and on July 6, 1977, Judge Boldt refused to certify the proposed classes (Opinion and Order Re Class Actions, Appendix, p. A11).

Petitioners allegations of prejudice are based on a series of *ex parte* communications, all of which were known and acknowledged by defendants before they made two informal oral requests that Judge Boldt recuse himself, months before they filed their original Motion to Disqualify.

Defendants specifically stated they intended to and, in fact, did request Judge Boldt to withdraw from presiding over litigation matters in these proceedings at a December 22, 1975 meeting. Yet, at that meeting, defendants did not indicate that they believed any of the contacts Mr. Ferguson had with the Court were either improper or a basis for disqualification. At that meeting, and again at the September 23, 1976 Pretrial Conference in Boston, defendants limited their complaints to the district court's receipt of the unread Holly Agreement and the "skimmed" Freeman letter which counsel for *defendants* made part of the record.

In fact, it appears that defendants hoped to intimidate the district court with threats of disqualification while issue after issue was being put before it for decision. When intimidation had run its course and failed, the Motion to Disqualify was actually filed, ten months late.

Each of Judge Boldt's rulings in this litigation has been founded on sound legal principles and precedent. There is absolutely no reasonable support for allegations of prejudice against defendants. At the onset of the class action briefing schedule, defendants were granted an initial four-week extension of time in which to conduct class action discovery by interrogatories and depositions as a requested prerequisite to their first memoranda in opposition to plaintiffs' class action motions (Order Re Defendants' Motion For Extension Of Time And Additional Discovery, Appendix, p. A28), and an additional two-week extension thereafter. Later they requested and received a 30-day extension to prepare an economic report.

Furthermore, six defendants alleged a myriad of counterclaims against both plaintiffs and unidentified class members. Following extensive briefing, which included the submission of supplemental memoranda after oral argument at the December 9-10, 1975 pretrial conference, Judge Boldt refused "to strike any of defendants' counterclaims on the basis of the argument of counsel rather than upon facts developed in discovery" (Order Re Plaintiffs' Motion to Dismiss Defendants' Counterclaims, Appendix, p. A30). Plaintiffs were obliged to answer all counterclaims and to include a sentence in the proposed Notices to class members informing members of the industrial user, retail grocer, wholesaler and agricultural molasses user classes that defendants have filed various counterclaims against certain plaintiffs and class members (Notice to Purchasers of Refined Sugar of Class Action Determination and Proposed Partial Settlement, Appendix, p. A32).

The district court ruled in favor of defendant National Sugarbeet Growers Federation's motion to dismiss for lack of jurisdiction and proper venue (Order Re Defendant National Sugarbeet Growers Federation's (NSGF) Motion To Dismiss for Lack of Jurisdiction and Proper Venue, Appendix, p. A48), and imposed sanctions against certain plaintiffs who did not comply with defendants' discovery requests (Order Re Defendants' Motion to Dismiss for Failure to Answer or Timely Answer Defendants' Class Action Interrogatories, Appendix, p. A50).

SUMMARY OF REASONS FOR DENYING THE WRIT.

The writ should be denied because:

1. The decision of the Ninth Circuit is in accord with the decisions of this Court and the decisions of other Courts of Appeal.

2. The decision of the district judge is a correct application of statutory and case law and does not conflict with the decisions of this Court or of other Courts of Appeal.

REASONS FOR DENYING THE WRIT.

1. The Decision of the Ninth Circuit Is in Accord With the Decisions of This Court and the Decisions of the Other Courts of Appeal.

There is no conflict either among the circuits or with any decision of this Court in the cases cited by Petitioners.

Judge Boldt, as the Court stated in *Berger v. United States*, 255 U. S. 22, 36 (1921), "had a lawful right to pass upon the sufficiency of the affidavit" and followed the proper standard, namely, accepting the allegations as true, whether they were legally sufficient to require disqualification, and whether it reasonably appeared that he was prejudiced, biased, or likely to be partial.

In the *Berger* case, a criminal case under the World War I Espionage Act against German defendants, Judge Landis had stated:

> "One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States, and have the interests of the enemy at heart by defending that things they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such; and now, when this country is at war with

> Germany, you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower."

That in no way resembles the facts averred in the Petition here.

Petitioners have attempted to create a straw man conflict between the 5th and 10th Circuits (but apparently not the 9th Circuit) in an effort to bring before your Honorable Court what is essentially dissatisfaction with the rulings of an experienced and eminently fair trial judge.

The fact that in *Parrish v. Board of Com'rs. of Alabama State Bar*, 524 F. 2d 98 (5th Cir. 1975), *cert. denied*, 425 U. S. 944 (1976), the Court found that the litigant's concern was not reasonable and that in *United States v. Ritter*, 540 F. 2d 459 (10th Cir.), *cert. denied*, — U. S. —, 97 S. Ct. 370 (1976), it found that the concern was reasonable, does not mean that different tests were followed, but simply that the fact situations were different and, therefore, required different answers.

In the *Parrish* case, as in the model opinion by Justice Rehnquist in *Laird v. Tatum*, 409 U. S. 824 (1972), the Court examined the allegations and, as Judge Boldt did, found them insufficient to satisfy the test of reasonable belief that the judge was biased or prejudiced.[1]

1. The district judge did not write a lengthy Opinion setting forth all the relevant facts and law, nor did he have any obligation to do so. See *Laird v. Tatum*, 406 U. S. 824 (1972).

Petitioners have distorted the *Parrish* decision, in their attempt to obtain review by this Court. Both the *Parrish* and *Ritter* Courts stated that Section 455, as amended, demands an assessment of the reasonableness of a belief that partiality exists. Contrary to Petitioner's representations, the *Parrish* Court did not suggest that a litigant must demonstrate the existence of actual bias. The *Parrish* Court applied an objective test, based on what a reasonable man confronted with the facts of the particular case would reasonably believe. The *Ritter* Court, applying the same standard, stated that the question is ". . . whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists a *reasonable likelihood* that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court." 540 F .2d at 464 (emphasis added).

Similarly, in *Curry v. Jensen*, 523 F. 2d 387, 388 (9th Cir.), *cert. denied*, 423 U. S. 998 (1975), the Court of Appeals for the Ninth Circuit stated:

> "To be legally sufficient to require disqualification, the affidavit must state facts sufficient to convince a reasonable man that the judge possesses bias or prejudice in the matter. (citations omitted) The appellant stated no specific facts to support allegations of bias or prejudice that would meet this standard."

Judge Boldt applied the "reasonableness" standard, when he denied the Motion to Disqualify. The *Ritter* and *Parrish* decisions, the decisions of the Ninth Circuit as well as the decision of Judge Boldt, are in complete accord with one another, and with the amended statute and relevant case law. As the report of the Senate Judiciary Committee recommending adoption of the amended statute stated:

"At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. (Emphasis in original) Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice. S. Rep. No. 93-419, 93rd Cong., 1st Sess., 1973, p. 5, quoted in 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction,* § 3549.

2. The Decision of the District Judge Is a Correct Application of Statutory and Case Law and Does Not Conflict With the Decision of This Court or of Other Courts of Appeal.

(a) Duty to Sit.

Petitioners' contention that the District Judge, in denying the Motion to Disqualify, relied on the "duty to sit" concept is totally without merit. As set forth above, Judge Boldt applied the reasonableness standard required by statutory and case law. In his Opinion, he stated: "Any person thinking or acting *reasonably* must reach his or her opinions and conclusions upon established *facts*, as distinguished from conjecture, suspicion, rumor or inferences drawn from other than established *facts*" (emphasis in original), and concluded that: "In my fully considered judgment, there is no *reasonable* basis either in fact or law

for my disqualification in this litigation (emphasis in original)." (Petitioners' Appendix B, page 13a).

Judge Boldt did observe that the litigation was and would be extensive and fraught with "numerous problems" and "difficult decisions" and, said that he would not avoid or abandon those problems although it would be "easy to escape those onerous duties by granting the motion for my disqualification." (Petitioners' Appendix B, p. 13a). He did *not* rely on the "duty to sit" concept in making that decision, and his Opinion is clear in that regard. A judge's awareness of the burden which his disqualification, and the consequent reassignment of the case, would place on other judges in the district should not be confused with reliance on the "duty to sit" concept.

Section 455 was not intended to provide a vehicle by which a judge could escape the obligations of complex litigation. In fact, the Court of Appeals for the Tenth Circuit, the same Court of Appeals cited by the defendants as correctly construing the Amended Section 455(a), in *United States v. Bray,* 546 F. 2d 851, at 857 (10th Cir. 1976), recently described a judge's professional responsibility as follows: "A trial judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true."

Judge Boldt obviously recognized that a motion alleging bias and prejudice on the part of the trial judge which, when examined, shows simply that the litigant is dissatisfied with certain rulings or does not like a particular judge, is not adequate to require disqualification. *United States v. Bray, supra; United States v. Goeltz,* 513 F. 2d 193 (10th Cir.), *cert. denied* 432 U. S. 830 (1975).

(b) Petitioners Are Unable to Show Bias, Prejudice, Partiality or Impropriety.

Neither Section 144 nor Section 455 was intended to "grant an automatic veto power in order that counsel might choose a judge who meets with their approval." *Samuel v. University of Pittsburgh,* 395 F. Supp. 1275, 1277 (W. D. Pa. 1975), *rev'd on other grounds,* 538 F. 2d 991 (3d Cir. 1976).

Federal judges are presumed to be impartial. *United States v. Mitchell,* 377 F. Supp. 1312, 1316 (D. D. C.), *petition for mandamus denied,* 502 F. 2d 375, *cert. denied,* 418 U. S. 955 (1974).

The presumption of impartiality cannot be lightly discarded. Judges regularly rule upon and exclude evidence; they rule upon motions to suppress; they receive and read presentencing reports; they participate in settlement negotiations, and they proceed with litigation which has been partially settled; all without disqualification. The statutory provisions concerning disqualification of federal judges should not be used as a means to intimidate the judiciary. As discussed herein, *not one* of the Petitioners' allegations substantiates charges that the district court's impartiality can reasonably be questioned.

Defendants have constructed an argument based on *their own* attacks on the district court. Confronted with a similar situation in *In Re: Union Leader Corporation,* 292 F. 2d 381 (1st Cir. 1961), the First Circuit denied a Petition For Mandamus to review the trial court's refusal to recuse itself. The Appellate Court quoted the trial judge as follows:

> "It is true that your client has been in the business of attacking me, but I haven't attacked your client. And I regard his misconduct as giving no basis for alleging misconduct on my part." 292 F. 2d at 388.

In denying the Petition for Mandamus, the First Circuit stated:

> "A judge lives in an atmosphere of strife, in which, by nature and experience, he is expected to be a man of 'fortitude.' (citations omitted) He must continually rule against one party or another. No judge can be so sanguine as to believe that he is never the object of disapproval and criticism directed to something more personal than his abstract judicial actions. If such disapproval is brought openly to his attention he does not automatically change from benign to biased. It is neither practical nor reasonable to liken a judge to an ostrich, unconcerned so long as his head is in the sand." 292 F. 2d at 389.

It is well settled that personal bias requiring a trial judge to disqualify himself must be of extra-judicial origin which renders his participation in the case unfair, in that it results in an opinion formed by the judge on a basis other than what he learned by his participation in the case. *United States v. Grinnell Corp.,* 384 U. S. 563 (1966); *United States v. Bray, supra; United States v. Montecalvo,* 545 F. 2d 684 (9th Cir. 1976); *United States v. Thompson,* 483 F. 2d 527 (3rd Cir. 1973); *Davis v. Cities Service Oil Co.,* 420 F. 2d 1278 (10th Cir. 1970). Petitioners allege that the District Court's personal friendship with one of plaintiffs' counsel supports charges of impropriety, personal bias and prejudice. That contention is incorrect as a matter of fact and of law. Impartiality is clearly demanded of our judiciary. Dictates of due process require a trial in a fair and unbiased tribunal. *Ward v. Village of Monroeville,* 409 U. S. 57 (1972). However, no Court has ever held that friendship may not exist between a judge and an attorney. It is respectfully suggested that if such

friendships were a basis for disqualifying a judge, the federal bench would soon be empty.

Petitioners respectfully submit that, accepting the misleading allegations of Petitioners as verity, the allegations still do not support charges of bias or prejudice on the part of the district court.

(c) Petitioners' Motion to Disqualify the District Judge Was Not Timely Filed.

Petitioners also failed to comply with the timeliness requirement of Section 144. Petitioners were dilatory in filing their Motion for Disqualification, and on that basis alone, the district court could have denied the motion. *See, e.g., United States v. Hurd,* 549 F. 2d 118 (9th Cir. 1977) (affidavit filed 5 days after the start of trial is untimely); *Knoll v. Socony Mobil Oil Co.,* 369 F. 2d 425 (10th Cir. 1966) (24 days after case is set for trial is too late); *Chessman v. Teets,* 239 F. 2d 205 (9th Cir.) *rev'd on other grounds,* 354 U. S. 156 (1956) (29 days after affiant became aware of facts is too late). Furthermore, Petitioners' informal suggestions that the district court withdraw from the litigation do not excuse their untimely filing of the Section 144 motion. *See, e.g., United States v. De La Fuente,* 548 F. 2d 528 (5th Cir. 1977); *Brotherhood of Loc. Fire and Eng. v. Bangor and Aroostock R. Company,* 380 F. 2d 570 (D. C. App. 1967)*cert. denied,* 389 U. S. 970 (1968).

Stringent construction of the time requirement of 28 U. S. C. § 144 prevents litigants from trying "to sample the temper of the Court before deciding whether to file the affidavit." *Hall v. Burkett,* 391 F. Supp. 237 (W. D. Okla. 1975), citing *Peckham v. Ronrico Corp.,* 288 F. 2d 841 (1st Cir. 1961).

In summary, Petitioners have plainly failed in their attempt to demonstrate that they are entitled to the writ.

CONCLUSION.

For the reasons set forth above, the Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit should be denied.

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CERTIFICATE OF SERVICE.

I hereby certify that on this 29th day of July, 1977, three copies of the Brief On Behalf Of Real Parties In Interest In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit were served, in compliance with Supreme Court Rule 33, by first class mail, postage prepaid, on each of the individuals listed on the current official Service Lists. I further certify that all parties required to be served have been served.

/s/ HAROLD E. KOHN,
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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—

No. 76-3303

—

IN RE: SUGAR ANTITRUST LITIGATION
MDL 201
BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,

v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants-Appellants.

—

ORDER.

—

(Filed January 28, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration of the motion to dismiss, the appeal is dismissed for lack of jurisdiction. *Blackie v. Barrach*, 524 F. 2d 891 (9th Cir. 1975).

SHIRLEY M. HUFSTEDLER
ANTHONY M. KENNEDY
U. S. Circuit Judges

Mo Cal 1/24/77

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—

No. 76-3303

—

BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,

v.

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, AMERICAN CRYSTAL SUGAR COMPANY, a dissolved New Jersey corporation, AMERICAN CRYSTAL SUGAR COMPANY, a Minnesota agricultural cooperative, U and I INCORPORATED (formerly Utah-Idaho Sugar Company),
Defendants-Appellants,

– AND RELATED CASES

—

ORDER.

—

(Filed June 6, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration, the petition for a rehearing is denied. Our decision in *Blackie v. Barrack* (9th Cir. 1975) 524 F. 2d 891, *cert. denied* (Oct. 4, 1976) 45 U. S. L. W. 3249, is dispositive in spite of appellants' argument that *Blackie's* application to their effort to secure an interlocutory appeal heralds a per se rule of non-

appealability of class certification orders. The present petition provides us no occasion to express an opinion as to what our reception would be to an appeal from a certification order in a different case.[1]

Petition for Rehearing is DENIED.

1. It is noteworthy that even under the practice in the Second Circuit, the certification order in the present case would probably not be appealable until final judgment. (*See* Parkinson v. April Industries, Inc. (2d Cir. 1975) 520 F. 2d 650, 658 ("Our court in *General Motors* recognized that an appellant would not be able to satisfy the three-pronged test for an immediate interlocutory appeal if he only questioned the propriety of the discretionary ruling of a trial judge that the requirements of Rule 23(b)(3) had been met. . . . The appellants' claims concern only the discretionary ruling of the district judge that the prerequisites of Rule 23(a) . . . and Rule 23(b)(3) have been satisfied . . . . We therefore dismiss the appeal.").)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—

No. 76-2919

—

IN RE: SUGAR ANTITRUST LITIGATION
(M. D. L. No. 201)

AMERICAN CRYSTAL SUGAR COMPANY, a dissolved New Jersey corporation, AMERICAN CRYSTAL SUGAR COMPANY, a Minnesota agricultural cooperative, AMSTAR CORPORATION, CALIFORNIA BEEF GROWERS ASSOCIATION, THE AMALGAMATED SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY, and U AND I INCORPORATED,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,

Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS

—

MEMORANDUM ORDER.

—

(Filed June 7, 1977)

—

Before: HUFSTEDLER and GOODWIN, *Circuit Judges*

Petitioners seek a writ of mandamus to overturn the respondent-district court's certification of fifteen classes

and three subclasses in a treble damages antitrust suit alleging price fixing under Section 1 of the Sherman Act, 15 U. S. C. § 1 (1973). Petitioners argue, *inter alia,* that the district court abused its discretion in finding that the antitrust action satisfied the prerequisites to class action treatment under Fed. R. Civ. P. 23(a) and 23(b)(3). For example, they allege that common questions of fact or law (*see* Fed. R. Civ. P. 23(b)(3)) do not predominate over individual questions in the present action where the antitrust claims involve a variety of geographic and product markets as well as different pricing and distributing structures. Furthermore, petitioners argue that conflicts exist among class members which preclude a finding that the class representatives will adequately protect the interests of the class. (*See* Fed. R. Civ. P. 23(a)(4).)

In *Kerr v. United States District Court for the Northern District of California* (1976) 426 U. S. 394, the Supreme Court recently underscored the extraordinary nature of the mandamus remedy. ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations . . . amounting to a judicial 'usurpation of power'. . . ." (*Id.* at 402.) This circuit has interpreted *Kerr* in *Arthur Young & Co. v. United States District Court* (9th Cir. 1977) 549 F. 2d 686 to require a petitioner seeking mandamus to show that the district court committed "clear and indisputable" error *and* that no "alternative procedural means" are available to correct this error. (*Id.* at 692 (". . . If we determine that the error, if any, is not 'clear and indisputable,' or that there are alternative means available to correct the error . . . the writ will not issue. . . . Interference with the trial court's control over its own proceeding is not a matter to be undertaken lightly or on the basis of mere speculation by the parties . . . about what may occur at some future date." *Id.*).)

Petitioners have not demonstrated that they are entitled to the writ under the *Arthur Young* test. Without passing on the merits of the lower court's certification, we hold that petitioners have not made a threshold showing of "clear and indisputable" error to invoke the writ. (*See Windham v. American Brands, Inc.* (4th Cir. 1976) 539 F. 2d 1016, 1021 (Although defendants argued that class action treatment was improper where differences in product and geographic markets as well as conflicts among class members created predominating individual questions as to proof of impact, the court noted that "there is almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act."); *Philadelphia Electric Co. v. Anaconda American Brass Co.* (E. D. Pa. 1968) 43 F. R. D. 452, 457-58; *Siegel v. Chicken Delight, Inc.* (N. D. Cal. 1967) 271 F. Supp. 722, 726 ("It is the existence . . . of the alleged conspiracy to substantially lessen competition in the market place, to illegally restrain trade . . . and the conduct that established said conspiracy that form the common questions of law or fact in this case . . . . 'The fact that the members of the class vary in size, type and market locations and the fact that there may be peculiar differences between them with respect to the determination of their damages . . . does [*sic*] not render this class action improper . . . ."); *In re Master Key Antitrust Litigation* (D. Conn. 1975) 70 F. R. D. 23, 26, *appeal dismissed* (2d Cir. 1975) 528 F. 2d 5; *State of Illinois v. Harper & Row Publishers, Inc.* (N. D. Ill. 1969) 301 F. Supp. 484, 492-94; Von Kalinowski, 14 Antitrust Law and Trade Regulation § 108.03[4], p. 108-81 (1974) ("The typical issue regarding violations is often the existence of a single underlying conspiracy. It does not necessarily matter that the victims of that conspiracy may have suffered in different ways

depending upon the nature of their respective relationship with the conspirators. The essential issue common to all plaintiffs is that they must first prove a conspiracy before there can be any contention as to questions idiosyncratic to individual class members.").) Nor have petitioners shown that alternative procedural means are unavailable to correct the district court's allegedly improper certification.[1] (*E.g.*, Fed. R. Civ. P. 23(c)(4) provides a mechanism for handling conflicts among class members should they arise in the course of litigation. *See Blackie v. Barrack* (9th Cir. 1975) 524 F. 2d 891, 909, *cert. denied* (October 4, 1976) 45 U. S. L. W. 3249 (". . . As a result, courts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit."); Von Kalinowski, *supra*, at § 108.02[5], p. 108-56.)

The decision to issue a writ of mandamus is one totally within this court's discretion. We refused to grant the writ in *Arthur Young, supra*, because it "would certainly have [had] the deleterious effect of encouraging frivolous and

1. The district court's certification of the antitrust class action is appealable upon final judgment. Petitioners do not satisfactorily explain why the availability of such an appeal is not an "alternative procedural means" to mandamus. Petitioners merely invoke the familiar battle-cry of class action defendants that certification of a massive class action forces defendants to settle the suits. But we have rejected this argument in the interlocutory appeals context (*see* Blackie v. Barrack (9th Cir. 1975) 524 F. 2d 891, 899, *cert. denied* (Oct. 4, 1976) 45 U. S. L. W. 3249 (". . . The fairness of the pressure—*i.e.*, the sociological merits of the small claims class action—is not a question for us to decide. The fact is that Congress, by authorizing . . . Rule 23(b)(3), created a vehicle to put small claimants in an economically feasible litigating posture.")), and the soundness of the argument has been disputed on empirical grounds. (*See* Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 Geo. L. J. 1123, 1136 (1974); DuVal, The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II), 1976 ARA Res. J. 1273, 1347-8.)

dilatory petitions under the guise of requests for 'supervision' or 'advice' from the Court of Appeals on matters traditionally within the exclusive sphere of the trial court's discretion, at least until final judgment has been entered." (549 F. 2d at 691, n. 7.) Petitioners have not persuaded us why this language does not similarly bar the exercise of our discretion in their favor in the present suit.

Petition for writ of mandamus is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—

No. 76-2919

—

AMERICAN CRYSTAL SUGAR CO., a dissolved New Jersey corp., AMERICAN CRYSTAL SUGAR CO., a Minnesota agricultural cooperative, AMSTAR CORPORATION, CALIFORNIA BEET GROWERS ASSOCIATION, THE AMALGAMATED SUGAR COMPANY, THE GREAT WESTERN SUGAR CO., and U & I INCORPORATED,

Petitioners,

v

U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORP., et al.,

Real Parties in Interest.

ORDER.

(Filed June 27, 1977)

Before: HUFSTEDLER, *Circuit Judge*

Upon due consideration, petitioners' motion for extension of time to July 12, 1977 in which to file a petition for rehearing is granted.

DOCKET No. 250

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION MDL-250 IN RE FOLDING CARTON ANTITRUST LITIGATION.

ORDER ASSIGNING TRANSFEREE JUDGE.

(Filed October 6, 1976)

It is hereby ordered that all previous orders of the Panel transferring actions in this litigation to the Northern District of Illinois for coordinated or consolidated pretrial proceedings pursuant to 28 U. S. C. § 1407 be amended to assign these actions to Judge Edwin A. Robson along with the previously-assigned Judge Hubert L. Will. Each transferee judge shall have total jurisdiction over the coordinated or consolidated pretrial proceedings in this litigation and each judge may act individually and/or jointly with respect to those proceedings.

FOR THE PANEL:

JOHN MINOR WISDOM,
John Minor Wisdom,
Chairman.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—

Master File No. MDL 201

—

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

No. C77-0200 GHB

A & P BAKERY SUPPLY & EQUIPMENT CO., INC.,
Plaintiff,

v.

AMSTAR SUGAR CO., *et al,*
Defendants.

No. C77-0194 GHB

CONTINENTAL COFFEE COMPANY OF FLORIDA,
Plaintiff,

v.

AMALGAMATED SUGAR CO., *et al.,*
Defendants.

No. C77-0198 GHB

FEDERAL BAKE SHOPS, INC., *et al.,*
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.,*
Defendants.

OPINION AND ORDER RE CLASS ACTIONS.

GEORGE H. BOLDT,
Sr. United States District Judge

No. C77-0197 GHB

SETHNESS GREENLEAF, INC., *et al.*,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C77-0189 GHB

A. C. JORDAN, *et al.*,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C77-0199 GHB

EUGENE KLEIN, *et al.*,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C77-0191 GHB

WALDORF BAKERS, INC.,
Plaintiffs,

v.

AMSTAR CORP., *et al.*,
Defendants.

No. C77-0708 GHB

SAMBO'S RESTAURANTS, INC.,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C75-1131 GHB

SEECO, INC., AND W. R. GRACE & CO.,
Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY, *et al.*,
Defendants.

No. C75-1808 GHB

MISSOURI FARMERS ASSOCIATION, INC.,
Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY, *et al.*,
Defendants.

Pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, various plaintiffs move this Court for an order determining that certain actions in this litigation should proceed as class actions.

Plaintiffs in *Jordan, Sethness Greenleaf, Continental Coffee, Federal Bake Shops, Klein, Waldorf* and *A & P Bakery* have filed a consolidated motion requesting:

(1) That plaintiffs in *Waldorf, Sethness Greenleaf,* and *Federal Bake Shops* be designated class representa-

tives for a class of industrial-user purchasers of refined sugar, consisting of all persons or private entities doing business as industrial sugar users in the Eastern Market[1] who have purchased refined sugar for use or incorporation in producing, manufacturing or processing foodstuffs, including beverages, for human or animal consumption, and who have not offered such sugar for resale as sugar, against the defendants listed below:

(2) That plaintiffs in *Klein* and *Jordan* be designated class representatives for a class of retail grocer purchasers of refined sugar, consisting of all persons or private entities doing business as retail grocers in the Eastern Market who have purchased refined sugar for the eventual resale of such sugar for use or incorporation by the consumer in a variety of foodstuffs or beverages for human or animal consumption, against the defendants listed below;

(3) That plaintiffs in *Continental Coffee and A & P Bakery* be designated class representatives for a class of wholesaler purchasers of refined sugar, consisting of all persons or private entities in the Eastern Market who directly or indirectly purchased refined sugar as wholesalers for resale as sugar in either the original package or repackaged, against the defendants listed below:

°Amalgamated Sugar Company
°American Crystal Sugar Company
°American Crystal Sugar Company of Fargo, North Dakota
°California & Hawaiian Sugar Company

1. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island. New York, Pennsylvania, Maryland, West Virginia, Virginia, Michigan, Ohio, Kentucky, North Carolina, South Carolina, Tennessee, Mississippi, Alabama, Georgia, Florida, Arkansas, Louisiana, New Jersey, Delaware, and the District of Columbia.

°California Beet Growers Association
°Consolidated Foods Corp.
°Great Western Sugar Company
°Holly Sugar Corporation
°Imperial Sugar Company
°National Sugarbeet Growers Federation
°Utah-Idaho Sugar Company
°°Buckeye Sugars, Inc.
°°Northern Ohio Sugar Company
°°Monitor Sugar Company
°°Godchaux-Henderson Sugar Co., Inc.
°°Southdown Sugars, Inc.
°°Supreme Sugar Company, Inc.
°°The South Coast Corp.

Plaintiff in *Sambo's* seeks certification of a class consisting of all individuals or entities located in the Eastern Market, engaged in the preparation and manufacture of food products, who purchased refined sugar directly or indirectly from certain defendants in liquid or dry form, in bags or in bulk during a period beginning sometime in 1949 and continuing to 1977. The following defendants are named in *Sambo's:*

Amalgamated Sugar Company
American Crystal Sugar Company
California and Hawaiian Sugar Company
Consolidated Foods Corp.
Godchaux-Henderson Sugar Co., Inc.
Great Western Sugar Company
Holly Sugar Corporation

° These defendants previously were involved in only MDL-201.

°° These defendants were not previously named in either MDL-201 or MDL-201A.

Imperial Sugar Co.
National Sugarbeet Growers Federation
Union Sugar Division
Utah-Idaho Sugar Co.

Finally, plaintiffs in *Seeco* and *Missouri Farmer's Association* have moved for certification of the following class:

> All persons entities in the Eastern Market who from January 1, 1955, to the present, purchased molasses for industrial use in the manufacturing, compounding, formulating or mixing of animal feed and other agricultural products.

Defendants in these two actions are:

Amstar Corp.
Amalgamated Sugar Co.
American Crystal Sugar Co.
California and Hawaiian Sugar Co.
Consolidated Foods Corp.
Great Western Sugar Co.
Great Western Sugar Co.
Holly Sugar Corp.
National Sugarbeet Growers Federation
Utah-Idaho Sugar Co.

BACKGROUND.

On December 19, 1974, the United States instituted two criminal actions and three civil injunctive proceedings in the Northern District of California against several sugar refiners charging them with violations of Section One of the Sherman Act, 15 U. S. C. Section 1. Subsequently, a large number of private antitrust actions were filed in several federal district courts. On June 2, 1975 the Judicial

Panel on Multidistrict Litigation transferred many of these actions to the Northern District of California for coordinated or consolidated pretrial proceedings pursuant to 28 U. S. C. Section 1407 and assigned them to the undersigned judge, sitting by designation pursuant to 28 U. S. C. Section 292(b). *In re Sugar Industry Antitrust Litigation,* 395 F. Supp. 1271 (J. P. M. L. 1975) (MDL-201). There are currently over 100 actions pending before this court, a significant number of which are class actions.

The complaints in the litigation before this court differ slightly but generally allege that defendants and certain co-conspirators conspired to and did fix, stabilize and raise the basic price for refined sugar, established prepaid freight applications and eliminated and reduced allowances to customers in each of the marketing areas known in the sugar industry as the Chicago-West, California-Arizona and Intermountain-Northwest territories. Moreover, certain complaints allege that defendants and several co-conspirators conspired to and in fact did restrain the sale and use of private label sugar, charge customers in some areas discriminatorily higher prices than customers in other areas, and adopt the so-called "basing point" system of pricing. It is further alleged that as a result of the conspiracy, plaintiffs paid higher prices for refined sugar than would have been paid if there had been no conspiracy. Finally, two complaints allege that certain defendants conspired to fix, raise, maintain and stabilize the price of molasses in the three affected market areas. Plaintiffs seek to recover treble damages and reimbursement of costs and attorneys' fees as compensation for the alleged injuries.

Defendants named in some or all of these complaints include, *inter alia,* Amalgamated Sugar Company; American Crystal Sugar Company; American Crystal Sugar

Company of Fargo, North Dakota; Amstar; California Beet Growers Association; California & Hawaiian Sugar Company; Great Western Sugar Company; Holly Sugar Corporation; Imperial Sugar Company; National Sugarbeet Growers Federation; SuCrest Corporation; Utah-Idaho Incorporated; and Union Sugar Division, Consolidated Foods Corporation (the Western defendants).

On May 20, 1976 this court issued an opinion and order certifying various classes and subclasses of industrial sugar users, wholesalers, retail grocers, and purchasers of molasses for use in processing agricultural products in the Chicago-West, California-Arizona and Intermountain-Northwest markets. In addition, individual classes of governmental entities were certified for each of the Western states represented in the litigation. *In re Sugar Industry Antitrust Litigation* (MDL-201), 1977-1 CCH Trade Cas. ¶ 61,373 (N. D. Cal. 1976).[2] On September 17, 1976, two additional governmental entity classes were certified.

An additional branch of this litigation, entitled *In re Sugar Industry Antitrust Litigation (East Coast),* was established by the Panel in the Eastern District of Pennsylvania and assigned to the Honorable Edward N. Cahn for coordinated or consolidated pretrial proceedings pursuant to 28 U. S. C. § 1407. *In re Sugar Industry Antitrust Litigation,* 399 F. Supp. 1397 (J. P. M. L. 1975) *(Freedman);* 405 F. Supp. 1404 (J. P. M. L. 1975 *(Hudson).* This branch of the litigation has been denominated MDL-201A.

MDL-201A now includes approximately 20 actions. The plaintiffs in MDL-201A are various industrial and institutional users, wholesalers and retail grocers, located

2. On June 7, 1977, the United States Court of Appeals for the Ninth Circuit denied a petition for a writ of mandamus to set aside the May 20, 1976 class certification order.

in the Eastern United States, many of whom are suing individually as well as on behalf of others similarly situated. Several purported governmental entity class actions are also pending in MDL-201A. The principal defendants in these actions are Amstar; Borden, Inc. and several of its subsidiaries; CPC International, Inc.; Michigan Sugar Company; National Home Products Corporation; The National Sugar Refining Company; Savannah; and Sucrest Corporation (including Revere Sugar Co.). The complaints also name several corporations, firms and individuals as co-conspirators.

On October 21, 1976, Judge Cahn certified separate classes of industrial users, retail grocers and institutional users in the Eastern market. *In re Sugar Industry Antitrust Litigation* (MDL-201A), 73 F. R. D. 322 (E. D. Pa. 1976). Judge Cahn declined to certify an Eastern wholesaler class because the named plaintiff in the purported wholesaler class lacked standing. *Id.* at 340. A subsequent motion to certify an Eastern wholesaler class, brought by a different named plaintiff, presently is *sub judice* in MDL-201A. And several motions to certify a variety of governmental entity classes are also pending before Judge Cahn.

Motions For Class Certification

On January 17, 1977, the Panel transferred a number of actions to the Northern District of California pursuant to 28 U. S. C. § 1407. *In re Sugar Industry Antitrust Litigation* (MDL-201), 427 F. Supp. 1018 (J. P. M. L. 1977). Seven of the ten actions presently before this court on motions for class certification were included in these recently transferred actions. These seven actions may be summarized as follows:

(1) In *Jordan, Sethness Greenleaf, Continental Coffee* and *Federal Bake Shops,* the named plaintiffs seek to represent various classes of purchasers of refined sugar in the Eastern market, allege a national conspiracy and include defendants heretofore involved exclusively in either MDL-201 or MDL-201A, as well as defendants Amstar and SuCrest. Several defendants not previously involved in either MDL-201 or MDL-201A are also added as defendants in the complaints in *Sethness Greenleaf, Continental Coffee* and *Federal Bake Shops.*

(2) In his complaint, the plaintiff in *Klein* seeks to represent a national class of retail grocery stores, alleges a national conspiracy, and names defendants heretofore involved in only MDL-201 or MDL-201A, Amstar and SuCrest, and new defendants.

(3) Plaintiff in *Waldorf* apparently seeks to represent a class composed of Eastern industrial users, alleges a regional (Eastern) conspiracy in his complaint, and names defendants previously involved in only MDL-201 or MDL-201A, as well as Amstar and SuCrest.

(4) Plaintiffs in *A & P Bakery* brings its action on behalf of Eastern wholesalers, alleges a regional (Eastern) conspiracy in its complaint, and includes defendants heretofore involved in only MDL-201 or MDL-201A, Amstar and SuCrest, and new defendants.

Although plaintiffs in *Jordan, Sethness Greenleaf, Continental Coffee, Federal Bake Shops, Klein, Waldorf* and *A & P Bakery* have not moved to amend their complaints, the consolidated motion for class certification filed by these plaintiffs excludes all defendants previously involved only in MDL-201A, as well as defendants Amstar and SuCrest. In addition, all plaintiffs, including Waldorf and A & P, have in effect alleged a national conspiracy in the consolidated motion.

The three other actions now before this court on class certification motions may briefly be summarized as follows. *Sambo's* is brought on behalf of a class of Eastern industrial users, alleges a national conspiracy, and names defendants involved in MDL-201, Amstar and SuCrest, and one new defendant. Plaintiffs in *Seeco* and *Missouri Farmers Association* have already been certified as representatives of a class of all persons or entities in the Chicago-West, California-Arizona and Intermountain-Northwest territories who purchased molasses for industrial use in the manufacture of animal feed and other agricultural products. *In re Sugar Industry Antitrust Litigation* (MDL-201), 1977-1 Trade Cas. (CCH) ¶ 61,373 (N. D. Cal. 1976), *as modified by In re Sugar Industry Antitrust Litigation,* MDL-201 (N. D. Cal., order filed August 16, 1976). Plaintiffs in *Seeco* and *Missouri Farmers Association* now seek certification of a similar class of Eastern industrial users of molasses. Defendants named in *Seeco* and *Missouri Farmers Association* include Western defendants and Amstar.

Consolidated Motion and Sambo's [3]

The court has carefully examined and thoroughly reviewed all of the motions, supporting and opposing memoranda, affidavits and exhibits incorporated therein submitted to the court by plaintiffs and defendants. And, the court has also closely considered the oral arguments presented on May 26, 1976. From this in depth analysis, the court is fully satisfied that plaintiffs' consolidated motion and Sambo's motion for class certification should be and hereby are denied.

The consolidated motion of the movants basically contends: (1) that the defendants presently before Judge

3. The consolidated motion for class action certification was filed in *Jordan, Sethness Greenleaf, Continental Coffee, Federal Bake Shops, Klein, Waldorf* and *A & P Bakery.*

Cahn may be financially unable to satisfy a judgment which might be entered against them in MDL-201A; and (2) that there is a possibility that no judgment will be entered against those defendants presently in MDL-201A, but that a conspiracy would be proved against the proposed additional defendants.

In addition, Sambo's contends that unless its class certification motion is granted, certain western defendants and their affiliates who sold sugar in the eastern market who have not been named in MDL-201A, may escape liability for these sales.

With the exception of the Eastern wholesaler class sought in *Continental Coffee* and *A & P Bakery*, all Eastern purchasers of refined sugar which the present movants seek to represent are already included in the industrial user, institutional user and retail grocer classes certified by Judge Cahn.[4] The certified classes in MDL-201A include *all* persons or private entities that have purchased refined sugar in the Eastern market, and are not restricted to those who purchased refined sugar from the defendants named in the various actions in MDL-201A. *In re Sugar Industry Antitrust Litigation*, (MDL-201A), *supra*, 73 F. R. D. at 359. Thus in their present class certification motions, movants are requesting this court to certify classes identical to those already certified by Judge Cahn, but against different defendants.

Among the factors that the court must consider under Rule 23(b)(3) is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Rule 23(b)(3)(B). This court is fully satisfied that the Eastern class representatives and their counsel have and will continue to adequately

4. A motion for certification of an Eastern wholesaler class presently is *sub judice* before Judge Cahn. *See* p. 6-7, *supra*.

represent and protect the interests of the Eastern class members. Indeed, there is no evidence that those members are at any significant disadvantage because the class representatives did not elect to name every sugar refiner that sold sugar in the Eastern market during the relevant time period.

Apart from speculation by counsel for movants in the consolidated motion, there is no indication that defendants in MDL-201A are not amply capable of satisfying any judgment that may eventually be entered in that litigation, or that Eastern class representatives will be unable to establish that the defendants already named in MDL-201A were involved in any conspiracy which allegedly affected sales of refined sugar in the Eastern market.

The Eastern class representatives have named all the major Eastern sugar refiners as defendants in MDL-201A, including Amstar, Borden and SuCrest. In his Opinion Concerning The Propriety of Class Actions, Judge Cahn clearly recognized that the Eastern class representatives had not elected to sue every conceivable defendant. Judge Cahn described the Eastern defendants, who have been excluded from the consolidated and *Sambo's* motions now before this court, as the "principal defendants" and noted that the Eastern class representatives also charged "various corporations, firms and individuals not named as defendants in these complaints . . . as co-conspirators who participated in the violations alleged therein, and who performed acts and made statements in furtherance of the averred combinations and conspiracies." *In re Sugar Industry Antitrust Litigation* (MDL-201A), *supra*, 73 F. R. D. at 333. The fact that Eastern class representatives did not name all potential defendants in no way demonstrates that the interests of Eastern class members are not already fully and fairly represented. For exam-

ple, in *Dorfman v. First Boston Corp.*, 62 F. R. D. 466 (E. D. Pa. 1974), plaintiffs sued only the principal and managing underwriters of a debenture securities offering but did not name as defendants several of the brokerage firms who were members of the original underwriting syndicate. Chief Judge Lord certified the classes requested and, commenting on plaintiffs' decision not to name all the brokerage firms as defendants, stated:

> A plaintiff, even one purporting to represent a class, surely must exercise some discretion in choosing his defendants. Without passing in any way on the merits of an action against other members of the original underwriting syndicate, we believe plaintiffs' decision to name only the principal and managing underwriters was within the realm of propriety and does not prejudice the rights of absent class members. *Id.* at 473.

See also State of Washington v. American Pipe & Construction Co., 280 F. Supp. 802, 804 n. 5 (S. D. Cal. 1968).

While plaintiffs in the consolidated motion seek to represent classes composed of all Eastern wholesalers, retail grocers and industrial users, plaintiff in *Sambo's* seeks certification of a class composed only of Eastern industrial users who purchased refined sugar from certain western defendants and their affiliates which have not been named as either defendants or co-conspirators in MDL-201A. Sambo's argues that unless the class it seeks is certified those western defendants and their affiliates will escape liability for their sales of refined sugar in the Eastern markets. Sambo's fears are unwarranted. It is clear that any sales of refined sugar in the Eastern market which may have been affected by the alleged conspiracy in MDL-201A are already involved in the actions before Judge

Cahn. In *State of Washington v. American Pipe & Construction Co., supra,* plaintiffs in a Sherman Act price-fixing action sought to recover from a named defendant for, *inter alia,* injuries sustained by purchases from non-defendants' non-conspirators. Plaintiffs argued that the alleged conspiracy increased the overall price level in the market, and that non-conspirators sold their products under this "umbrella" at higher prices than would have prevailed absent the conspiracy. The court held:

> . . . Sales by non-conspirators to these plaintiffs are clearly within the area of the economy in which competitive conditions allegedly disintegrated. The underlying purpose of the presumed conspiracy was to raise pipe prices by ending competitive bidding. If the alleged conspirators succeeded in this goal, [defendant] American is liable for damages sustained on all sales which were affected by the elimination of competition. The identity of the pipe seller, whether conspirator or not, is irrelevant. Plaintiffs' claims of injury arise directly from the proscribed activity. The alleged conspirators intended to raise the prices these claimants paid for the pipe which they manufactured. In doing so they may have also brought about increases in the prices charged by non-collaborators. If plaintiffs can establish as a matter of fact (1) that they paid more for pipe purchased from non-defendant non-conspirators than would have been paid absent the alleged conspiracy, and (2) that American's alleged conspiracy and (2) (sic) that American's alleged participation in anticompetitive conspiracy was the cause of such over-payment, nothing in the law will preclude recovery from American. *Id.* at 807.

See also Wall Products Co. v. National Gypsum Co., 357 F. Supp. 832, 840 (N. D. Cal. 1973).

Rule 23(b)(3)(D) also provides that the court must consider "the difficulties likely to be encountered in the management of a class action." Throughout the proceedings in MDL-201T, this court, Judge Cahn and all parties have, pursuant to the mandate of the Judicial Panel on Multidistrict Litigation, worked to develop a fair and efficient procedure by which to manage this massive and complex litigation. The court is convinced that granting the consolidated and *Sambo's* motions would impede the effective management of these cases.

Accordingly, for the reasons stated herein, the motions of plaintiffs in *Jordan, Sethness Greenleaf, Continental Coffee, Federal Bake Shops, Klein, Waldorf, A&P Bakery* and *Sambo's* for class certification are denied.

MOLASSES CLASS CERTIFICATION [5]

The court has fully reviewed and carefully considered the motion, supporting and opposing memoranda, affidavits and exhibits incorporated therein submitted to the court in connection with the present motion as well as the prior motion for certification of molasses classes in the Chicago-West, California-Arizona and Intermountain-Northwest territories by plaintiffs and defendants. Also, the court has examined a copy of the transcript of the May 26, 1977 hearing at which the motion was argued.

Based upon this review, the court recognizes that the record before it does not include sufficient reliable economic data relative to the structure of the molasses industry to allow an informed judgment on each of the requirements of Rule 23, F. R. Civ. P. Therefore, the court is satisfied that counsel for plaintiffs and defendants in *Seeco* and *Missouri Farmers Association* should file with

5. This motion for certification of an Eastern agricultural class was filed by plaintiffs in *Seeco* and *Missouri Farmers Association.*

the Court, within 30 days, an affidavit by an economist of their own choosing setting forth the structure and practices of the agricultural molasses industry in each of the four market areas and during the time periods involved in this litigation. Counsel for plaintiffs and defendants shall arrange for the parties' economists to confer in advance with a view of presenting to the Court a statement of agreed facts and principles. Those matters upon which the parties' economists do not agree may be the subject of separate affidavits.

By structure and practices the court has in mind the methods of distribution used, the chain of distribution, the approximate quantity and value sold annually, the market share of each defendant and the market share of non-defendants.

Any significant changes in the structure or practices of the industry during the last decade should also be reported.[6]

IT IS HEREBY SO ORDERED this 6th day of July 1977.

GEORGE H. BOLDT
George H. Boldt
Senior United States District Judge

6. MDL-201 and MDL-201A are closely related. Pursuant to the suggestion of the Judicial Panel on Multidistrict Litigation, Judge Cahn and the undersigned judge have acted in close collaboration.

Judge Cahn was on the bench in San Francisco throughout the hearing at which all matters pertaining to the subjects covered by this decision were presented in open court. Although signed by me, Judge Cahn concurs in every ruling stated in this decision.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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MDL #201

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IN RE SUGAR ANTITRUST LITIGATION

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ORDER RE DEFENDANTS' MOTION FOR EXTENSION OF TIME AND ADDITIONAL DISCOVERY

(Text telephoned to Harold Kohn and Stephen Bomse 4:00 p.m. 10/7/75)

Defendants' motion for extending the time for service and filing of the consolidated brief opposing class action joined in by all defendants, with annexed contentions solely relating to specific defendants, and for additional discovery pertaining to class action was fully briefed and presented to the Court in oral argument at New York City, September 29, 1975. At the conclusion of the argument, the Court directed both plaintiffs and defendants to submit additional memoranda relating to stipulations, both of which have now been received and reviewed.

Upon full consideration of all memoranda and argument submitted, the Court hereby rules on defendants' motion as follows:

IT IS HEREBY ORDERED THAT:

1. Defendants shall serve and file their brief opposing class action on or before Monday, November 10, 1975.

2. The parties shall expeditiously complete all discover plaintiffs have agreed to in their statement re class action discovery and shall expeditiously develop and execute written stipulations on all items plaintiffs have offered to stipulate solely as they pertain to class action determination.

3. Both parties shall promptly set up expedited schedule for the discovery authorized in the preceding paragraph, all of which shall be completed not later than Wednesday, November 5, 1975. The schedules shall include the specific interrogatories to be answered by plaintiffs and the specific plaintiffs to be deposed by defendants, which schedules shall be submitted to the Court at New York City not later than 2:00 p.m. Friday, October 10, 1975.

4. Plaintiffs' memorandum on class action in reply to that of defendants shall be served and filed on or before Monday, November 24, 1975.

5. Oral argument on the applications for class action shall be heard at San Francisco commencing at 9:30 a.m., Monday, December 1, 1975.

6. At the conclusion of the class action hearing, the Court will hear oral argument, if authorized, upon all then pending motions which have been fully briefed, and two copies of each brief mailed to reach Tacoma Chambers not later than November 24, 1975.

Dated at New York City this 7th day of October, 1975.

GEORGE H. BOLDT
George H. Boldt
Sr. United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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MDL-201

—

IN RE SUGAR ANTITRUST LITIGATION

—

ORDER RE PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS.

—

At the pretrial conference held December 9 and 10, 1975, the Court directed counsel for defendants asserting counterclaims to inform the Court which of the claims were compulsory and which were permissive pursuant to F. R. Civ. P. 13. Defendants responded by designating all the counterclaims compulsory and cited *Union Paving Company v. Downer Corp.*, 276 F. 2d 468 (9th Cir. 1960) for the proposition that compulsory counterclaims are those which bear a "very definite, logical relationship" to the main claim. The main contention of plaintiffs in this litigation, simply stated, is that defendants, sugar refiners and processors, have engaged in a broad, ongoing conspiracy to restrain trade with respect to the sale of refined sugar in various geographic markets.

Thus far, discovery on the merits has not been extensive in this litigation and the Court is reluctant to strike any of defendants' counterclaims on the basis of the argument of counsel rather than upon facts developed in discovery. On the other hand, some of defendants' counterclaims appear to have very little logical relationship to

plaintiffs' claims. In these circumstances, the Court denies plaintiffs' motion at this time, with leave to reassert it at the conclusion of discovery; provided, that no discovery shall be conducted concerning the counterclaims until the conclusion of pretrial discovery, unless otherwise ordered by the Court.

IT IS HEREBY SO ORDERED this 4th day of March, 1976.

GEORGE H. BOLDT
Sr. United States District Judge

NOTICE TO PURCHASERS OF REFINED SUGAR OF CLASS ACTION DETERMINATION AND PROPOSED PARTIAL SETTLEMENT.

THIS NOTICE APPLIES TO MEMBERS OF THE INDUSTRIAL-USER, RETAIL GROCER AND WHOLESALER CLASSES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—

Master File No. MDL 201

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In re

SUGAR ANTITRUST LITIGATION

Pursuant to Rules 23(c)(2) and 23(e), Federal Rules of Civil Procedure, and Order of the United States District Court for the Northern District of California, PLEASE TAKE NOTICE:

There are now pending in the United States District Court for the Northern District of California approximately eighty-five civil actions seeking treble damages for alleged violations of the antitrust laws with respect to the sale of refined sugar. Certain of these actions were brought on behalf of various classes of plaintiffs. As more specifically described below, this notice applies to the industrial-user, retail grocer, and wholesaler classes. *Read this Notice carefully* and determine if you are a member of one or more of these classes. If you are a member of one of these classes, your rights may be affected by this Notice. This Notice does not express the opinion of the

Court as to the merits of the claims or defenses asserted by either side in this litigation, but is sent to inform you of the pendency of the litigation, and the proposed partial settlement, so that you can decide what steps to take in regard thereto.

THE LITIGATION

The complaints in this litigation differ slightly, but generally allege that defendants and certain co-conspirators conspired to and did fix, stabilize and raise the basis price for refined sugar, established prepaid freight applications, and eliminated and reduced allowances to customers. In addition, certain complaints further allege that defendants and certain co-conspirators conspired to and did restrain the sale and use of private label sugar, charge customers in some areas discriminatorily higher prices than customers in other areas, and adopt the so-called "basing point" system of pricing. It is also alleged that as a result of the conspiracy, plaintiffs and class members paid higher prices for refined sugar than would have been paid if there had been no conspiracy. Plaintiffs seek to recover treble damages and reimbursement of costs and attorneys' fees as compensation for the alleged injuries.

Defendants deny the above allegations, deny any liability, and disclaim that plaintiffs or any potential class members are entitled to recover damages. Defendants have also filed counterclaims against certain plaintiffs and class members, which plaintiffs contend are without merit.

DEFENDANTS

The following corporations and associations have been named as defendants in one or more of the class lawsuits now pending before the Court:

The Amalgamated Sugar Company
American Crystal Sugar Company (a dissolved New Jersey corporation)
American Crystal Sugar Company (a Minnesota agricultural cooperative)
Amstar Corporation, previously known as American Sugar Company, including its Spreckels Sugar Division
Imperial Sugar Company
California and Hawaiian Sugar Company
Great Western Sugar Company
Holly Sugar Corporation
Union Sugar Division of Consolidated Foods Corporation
U and I Incorporated, formerly Utah-Idaho Sugar Company
California Beet Growers Association
National Sugarbeet Growers Federation
SuCrest Corporation

PLAINTIFFS AND THE CLASSES

To qualify as a class member in the classes covered by this Notice, you must have (1) purchased refined sugar during the relevant time periods specified in the class definitions described below, (2) in one or more of the geographic areas covered, and (3) been either an industrial-user of refined sugar, a retail grocer, or a wholesaler of sugar at the time such purchases were made. You may be a member of more than one of these classes.

It is not necessary for you to have purchased refined sugar from one of the defendants, or for you to have purchased directly from a sugar manufacturer or refiner to qualify as a class member. However, the fact that you have purchased sugar does not necessarily entitle you to share in any recovery in this litigation.

Please read the following definitions carefully; they are necessary to your understanding of this Notice.

(1) *Definition of Refined Sugar:*

"Refined sugar" means any grade, type or form of saccharine product (other than molasses) derived from the processing of sugar beets or in the refining of raw cane sugar, all of which contain sucrose, dextrose or levulose.

(2) *Definition of Geographic Areas Covered:*

The three geographic market territories involved are:

Chicago-West—Consisting of the states of Indiana, Illinois, Iowa, Minnesota, Wisconsin, North Dakota, South Dakota, Kansas, Nebraska, Colorado, Montana, Missouri, New Mexico, Oklahoma, Texas and Wyoming (east of Rawlins)

California-Arizona—Consisting of the states of California and Arizona and the cities of Las Vegas and Reno

Intermountain-Northwest – Consisting of the states of Washington, Oregon, Utah, Idaho and Wyoming (west of Rawlins)

(3) *Definition of Types of Refined Sugar Purchasers Covered By This Notice:*

To qualify as a member of one of the classes covered by this notice, you must be one of the following types of refined sugar purchasers:

Industrial users—any person or entity who purchased refined sugar for use or incorporation in the production, manufacturing or process-

ing of foodstuffs or beverages for human or animal consumption and who did not offer that sugar for resale as sugar. Restaurants included in this class are limited to those who were during the relevant time:

(a) members of the National Restaurant Association, The Food Service and Lodging Institute or their local affiliated organizations, or

(b) franchisees or franchisors that were engaged in the business of franchising restaurants in one of the three market areas described above.

Hospital and health care institutions, included in this class, are limited to those identified in the American Hospital Association's annual directory, "Guide to Health Care Field", or members of the Federation of American Hospitals.

Retail grocers—any person or entity who purchased refined sugar for eventual resale as sugar for use or incorporation by consumers in a variety of foodstuffs or beverages for human or animal consumption.

Wholesalers—all persons or entities who directly purchased refined sugar as wholesalers for resale as sugar in either the original package or repackaged.

THE CLASSES ESTABLISHED BY THE COURT

The classes to which this Notice pertains are:

(A) *For the Chicago-West Territory*

Subclass One—consisting of all *industrial sugar users* in the Chicago-West territory who purchased refined sugar in this area during the period from 1955 to present

Subclass Two—consisting of all *retail grocers* in the Chicago-West territory who have purchased refined sugar in this area during the period from 1955 to present

(B) *For the California-Arizona Territory*

Subclass One—consisting of all *industrial sugar users* in the California-Arizona territory who purchased refined sugar in this area during the period from 1949 to present

Subclass Two—consisting of all *retail grocers* in the California-Arizona territory who purchased refined sugar in this area during the period from 1949 to present

(C) *For the Intermountain–Northwest Territory*

Subclass One—consisting of all *industrial sugar users* in the Intermountain-Northwest territory who purchased refined sugar in this area during the period from 1949 to present

Subclass Two—consisting of all *retail grocers* in the Intermountain-Northwest territory who purchased refined sugar in this area during the period from 1949 to present

(D) *For the Chicago-West, California-Arizona, and Intermountain-Northwest Territories*

consisting of all persons or entities in the three territories previously defined who directly or indirectly purchased refined sugar as wholesalers during the period from 1949

to the present for resale as sugar in either the original package or repackaged.

Excluded from these classes are (1) the defendants, their subsidiaries and affiliated business entities, and (2) each plaintiff who has instituted and presently maintains a non-class action. The Plaintiffs representing each of these classes are listed at the end of this Notice.

Separate notice is being sent to Government entities which purchased refined sugar, and purchasers of molasses for agricultural use, which entities are not members of the classes to which this Notice applies by virtue of purchases.

Proposed Partial Settlement

A proposed partial settlement totalling $24,000,000 has been reached with three defendants on behalf of the classes covered by this Notice, as follows: Holly Sugar Corporation (hereinafter "Holly") ($5,000,000), Union Sugar Division of Consolidated Foods Corporation (hereinafter "Union") ($2,500,000), and California and Hawaiian Sugar Company (hereinafter "C and H") ($16,500,000). The proposed settlement with C and H, an agricultural marketing cooperative, includes settlement with C and H's 16 member patrons, one former member patron and five corporations that are parent corporations to various C and H member patrons (herein collectively called "C and H members"). These entities have settled without admitting liability, and the fact of such settlement is not to be taken as an indication that liability or damages will be found against the remaining defendants.

The proposed partial Settlement has been presented to the Court for its approval pursuant to Rule 23(e), Federal Rules of Civil Procedure, and the Court has authorized submission of the proposed settlement to the members of these classes. The Settlement Agreement has been filed with the Clerk, United States District Court, Northern District of California, and is available for your inspection. The following description is only a summary of the proposed settlement, and you are referred to the Settlement Agreement for its complete terms and provisions.

The settlement monies have been deposited in interest-bearing trust accounts for the benefit of the plaintiffs and members of the classes to which this Notice applies. The settling defendants have retained the right to withdraw from the proposed settlement if in the sole judgment of the settling defendants a significant number of class members elect to be excluded from the classes. The proposed settlement relates only to defendants Holly, Union and C and H and its members, and in no way limits or affects the claims being advanced against the other defendants. The terms of the proposed settlement apply to all antitrust claims against the settling defendants arising from purchases of refined sugar delivered in the three geographic market territories covered by this Notice, and do not apply to purchases by plaintiffs and class members outside of these three market territories. The place of delivery shall determine whether the purchase is encompassed within the settlement. The proposed settlement does not apply to the governmental and agricultural molasses user classes noted above.

The proposed partial settlement also provides for the dismissal with prejudice of all counterclaims filed by Holly, Union and C and H against plaintiffs and members of the classes who are to be bound by the settlement, but in no way limits or affects counterclaims advanced by the other defendants.

It is proposed that the settlement monies will be held in trust accounts for the benefit of the plaintiffs and class

members. All interest earned on the settlement monies will be added to the principal. You will be notified when distribution will be made, and will be given an opportunity to comment on or object to any proposed plan of distribution. Any plan of distribution adopted will be subject to Court approval. At the time of distribution, the settlement proceeds will be subject to charges for costs of suit and attorneys' fees in currently undetermined amounts. Upon proper application, the Court may also allow interim reimbursement of out-of-pocket expenses to defray the costs of litigation. These amounts will be set by the Court as fair and reasonable.

You should retain and preserve whatever business records you have relating to purchases of refined sugar for use in submitting a claim, if necessary, upon distribution of any recovery in this litigation.

Unless you object to the partial settlement described above, you need not take any action regarding this settlement at this time. A further Notice will be sent to you at a later date regarding distribution of the settlement proceeds.

PLEASE TAKE NOTICE

If you are a member of one or more of the classes to which this Notice applies, you will be included in and bound by any judgment, settlement or partial settlement in this litigation, as well as any determination affecting these classes, whether favorable or not, unless you file a written election to be excluded from the classes with William L. Whittaker, Clerk of the Court, Northern District of California, P. O. Box 3784, San Francisco, California 94119, postmarked no later than February 14, 1977. If you exclude yourself from the classes herein defined, you will remain free to pursue on your own behalf whatever legal rights you may have. However, if you exclude yourself, you will not participate in the distribution of any recovery resulting from this litigation, including the distribution of funds resulting from the partial settlement referred to above.

If you do not elect to be excluded from the classes, you may, but need not, enter an appearance through an attorney of your choice. You will be represented by the attorneys of record for the class representatives if you do not request exclusion or enter your appearance.

NOTICE OF HEARING ON APPROVAL OF SETTLEMENT

Pursuant to Order of this Court, a hearing will be held in the courtroom of The Honorable George H. Boldt, Senior United States District Judge, 19th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California at 10:30 a.m. on March 7, 1977, for the purpose of determining the reasonableness, adequacy and fairness of the proposed partial settlement, and whether the proposed partial settlement should be approved by the Court and all actions covered by this Notice dismissed with prejudice as against the settling defendants only. If you are satisfied with this proposed settlement, you need not appear at this hearing or take any action at this time. Any member of a class to which this Notice applies may appear at the hearing and show cause, if he has, why the proposal partial settlement should not be approved. No person will be heard at this hearing unless notice of intention to appear, and all grounds for his objection, together will all supporting papers and briefs, are filed with the Clerk of the Court in writing on or before February 14, 1977, at the address stated below, and also served upon both of the following:

Josef D. Cooper, Esq.
Cooper & Scarpulla
300 Montgomery Street
Suite 600
San Francisco, California 94104

William S. Boyd, Esq.
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104

All such documents should refer to the name and number of this action: "*In re Sugar Antitrust Litigation,* (Master File No. MDL 201)." Any class member who does not make his objection in the manner provided herein shall be deemed to have waived such objection and shall be forever foreclosed from making any objection (by appeal or otherwise) to the proposed partial settlement. The filing of an objection shall not exclude the objector from any judgment entered in this action. Anyone electing to be excluded from the classes covered by this Notice will not participate in any future distribution of the settlement monies.

As more fully set forth in the Settlement Agreement, upon the approval of the proposed partial settlement by the Court becoming final, each plaintiff accepting the settlement and each class member shall be deemed to have covenanted to refrain from proceeding against the settling defendants and the C and H members on any claims which were alleged or could have been alleged in these actions up to July 2, 1976 pertaining to purchases of refined sugar delivered in the three relevant geographic market territories, and based on or related to any federal or state antitrust law, or which are based on or related to any facts, matters or claims which were alleged or could have

been alleged in said actions up to the date of said agreements pertaining to refined sugar and based on or related to any federal or state antitrust laws. Under the terms of the Settlement Agreement, any similar claim based upon deliveries to plaintiffs and class members outside of the three geographic market territories shall be dismissed without prejudice.

FIING DOCUMENTS OR ELECTION TO BE EXCLUDED.

All documents that you file in this litigation should be addressed to:

William L. Whittaker
Clerk, United States District Court
Northern District of California
P.O. Box 3784
San Francisco, California 94119

The postmark on your envelope will determine if any document has been filed timely wtih the Court.

ADDITIONAL INFORMATION REGARDING THIS NOTICE

If you have any questions which you want to raise concerning the matters dealt with in this Notice, please direct your inquiries to the following members of Plaintiffs' Notice Committee:

Industrial-User Class

Josef D. Cooper, Esq.
Hazel I. Weiser, Attorney at Law
Cooper & Scarpulla
300 Montgomery Street, Suite 600
San Francisco, California 94104
Telephone: (415) 788-7020

Retail Grocer Class

Guido Saveri, Esq.
111 Sutter Street, Suite 2100
San Francisco, California 94104
Telephone: (415) 434-2100

Wholesaler Class

John H. Boone, Esq.
Boone, Schatzel, Hamrick & Knudsen
235 Montgomery Street, Suite 420
San Francisco, California 94104
Telephone: (415) 788-0656

The pleadings and other records in this litigation may be examined and copied at any time during regular office hours at the office of the Clerk, United States District Court, 18th Floor, 450 Golden Gate Avenue, San Francisco, California.

Dated: January 15, 1977

WILLIAM L. WHITTAKER,
Clerk,
United States District Court.

CLASS REPRESENTATIVES

CHICAGO-WEST TERRITORY

Subclass A: Industrial Users

Genesis Group, Inc.
Superior Beverage Company, Inc.; Edwards Old Orchard Restaurant, Inc.; Randhurst Corned Beef Center, Inc.
Baldi Candy Company

Anthony J. Pizza Food Products Corporation; T.C.H., Inc.; Herb Alpert's Donut Shop, Inc.
Plantation Baking Company, Inc.
Zion Industries, Inc. and McCleary Industries, Inc.
Home Juice Company and Bodines, Inc.
Schulze and Burch Biscuit Co.
Grist Mill Co.
Bresler Ice Cream Co.
Goelitz Confectionary Company
Milford Canning Company
Tri-R Vending Service Co.
Sethness Greenleaf Inc.
Merchants Restaurant, Inc.; Regency Steak House, Inc.; #2 Regency Steak House, Inc.
Blums of San Francisco, Inc. and Villager Foods, Inc.
Imperial Preserves, Inc.
Ewald Bros., Inc.
Seeco, Inc. and W. R. Grace & Co.
The Brothers Restaurants, Incorporated
Steak-O-Rama, Inc. and Steak-O-Rama No. 1, Inc.
Zarda Brothers Dairy, Inc. and the Page Milk Company
Schwan's Sales Enterprises, Inc.
International Industries, Inc.; The International House of Pancakes; Love's Enterprises, Inc.; The Original House of Pies, Inc.; Copper Penny Corporation; E.H.R. Corporation

Subclass B: Retail Grocers

Treasure Island Foods, Inc.
Courtesy Food Mart, Inc. and "Store No. 2" Courtesy Foods, Inc.
M. A. Lopez Supermarket, Inc. and M. A. Lopez Supermarket

CALIFORNIA-ARIZONA TERRITORY

Subclass A: Industrial Users

Sun Garden Packing Company
Eng-Skell Company
Zim's Restaurants, Inc.
Paoli's Restaurant, Inc. and Contemporary Foods, Inc.
Fantasia Confections, Inc.
Blums of San Francisco, Inc. and Villager Foods, Inc.
Mother's Cake & Cookie Co.
King Kelly Marmalade Company; Tropical Preserving Company and Knott's Berry Farm
General Bottlers, Inc. and Nesbitt Bottling of El Monte
International Industries, Inc.; The International House of Pancakes; Love's Enterprises, Inc.; The Original House of Pies, Inc.; Copper Penny Corporation; E.H.R.Corporation
Scandia Bakery

Subclass B: Retail Grocers

Raleys Inc. and Bel Air Mart, Inc.
Food Mart-Eureka; Food Mart-McKinleyville; Food Bowl Shopping Center; Quadro, Inc.; Vallegra's Drive-In Markets, Inc.

INTERMOUNTAIN-NORTHWEST TERRITORY

Subclass A: Industrial Users

Armand's Inc.; Scott's Food Service; Scott's Food Service, Inc.; International Kings Table, Inc.; International Kings Table of Rosewood, Inc.; International King's Table of Lancaster, Inc.
Eng-Skell Company
Mother's Cake & Cookie Co.

Northwest Packing Co.; Flavorland Foods, Inc.; Grandma Cookie Co.
International Industries, Inc.; The International House of Pancakes; Love's Enterprises, Inc., The Original House of Pies, Inc.

Subclass B: Retail Grocers

John's Food Centers, Inc. and Davis Bake Shop

WHOLESALERS

CFS-Continental-Los Angeles, Inc.; Continental-San Diego, Inc.; Continental-P.M. Inc.; Continental-G&M Foods, Inc.; Price Wholesale Grocery, Inc.; Continental-Palomar of Arizona, Inc.; Continental-Minnesota, Inc.; Continental-Indianapolis, Inc.; Continental-Hoxie, Inc.; Continental-South Chicago, Inc.; Continental-Kell, Inc.; Continental North Chicago, Inc.; Continental Coffee Company of Houston; Continental-Decatur, Inc.; Continental Coffee Company of Colorado; Polunsky's Inc.; Continental Big Red, Inc.; Continental-Panetta, Inc.; Continental Warehouse Market, Inc.; Continental-Artic, Inc.; Continental-National, Inc.
United A.G. Cooperatives, Inc.
Piedras Negras Wholesale; Saldana & Garza, Inc.; Amezcua Sales and Service

Please include or refer to this label, and the accompanying number when making inquiry.

WILLIAM L. WHITTAKER
Clerk, United States District Court
Northern District of California
P.O. Box 3784
San Francisco, California 94119

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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MDL-201

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IN RE SUGAR ANTITRUST LITIGATION

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ORDER RE DEFENDANT NATIONAL SUGARBEET GROWERS FEDERATION'S (NSGF) MOTION TO DISMISS FOR LACK OF JURISDICTION AND PROPER VENUE.

In the Order of December 23, 1975, the Court concluded that jurisdiction was lacking and venue improper with respect to plaintiff's claims against defendant NSGF filed in California, Minnesota and Illinois Districts. Although the Court considered severance and transfer of the claims preferable to dismissal, counsel were given an opportunity to file supplemental memoranda concerning the efficacy of a transfer of the NSGF claims and the location of a satisfactory forum for transfer.

The supplemental memoranda have been received, fully considered and the Court concludes that no useful purpose would be served by dismissing or transferring, for all purposes, the claims against defendant NSGF only to have them refiled in the District of Colorado and transferred to this Court by a further order from the Judicial Panel on Multidistrict Litigation.

IT IS HEREBY ORDERED that the claims against defendant NSGF filed in District Courts in the states of California, Minnesota, Illinois or other states shall and hereby are severed and deemed transferred to the District of Colorado as the proper transferor court. Provided that; the files in the cases will be retained by the clerk of the transferee court in San Francisco until the pretrial proceedings are completed at which time the MDL-201 transferee judge will determine what court of courts are the appropriate forums for trial, after full consideration of the best interests of the parties, counsel and the Court.[1]

Accordingly, counsel for defendant NSGF are directed to forthwith prepare and serve upon the Court and liaison counsel appropriate papers authorizing:

1. The severance of defendant NSGF from actions filed or to be filed and transferred to MDL-201; and

2. The transfer of plaintiffs' claims [2] against defendant NSGF to the District of Colorado consistent with the purposes and limitations on such a transfer specified above.

IT IS HEREBY SO ORDERED this 4th day of March, 1976.

GEORGE H. BOLDT
Sr. United States District Judge

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1. See Rule 11, Rules of Procedure of the Judicial Panel on Multidistrict Litigation; *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 374 (SDNY 1973) and cases cited therein.

2. Excluding those claims or actions filed in the District of Colorado against defendant NSGF.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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MDL-201

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IN RE SUGAR ANTITRUST LITIGATION

—

ORDER RE DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO ANSWER OR TIMELY ANSWER DEFENDANTS' CLASS ACTION INTERROGATORIES.

In the Court's Order of December 23, 1975, counsel were directed to serve and file supplemental memoranda concerning Defendants' Motion to Dismiss for failure to answer or timely answer defendants' class action interrogatories. The memoranda having been received, fully reviewed and considered, the Court hereby finds and holds that if class action is certified, the following plaintiffs shall be ineligible for class or subclass representative status:

Civil No. C-75-0504 Chateau International Cuisine, Inc., Donut Hole, Inc., Ling Chinese Foods, Inc., Ling Wong Restaurant, Inc., and The Menu Tree, Inc.

Civil No. C 75-0505 Renshaw's A&W of Springfield, Inc., Couch E. Wallace and Washington A&W, Inc.

Civil No. C 74-1123 Heinemann's, Inc.

The foregoing plaintiffs, not having served and filed answers to the portions of defendants' class action interrogatories not objected to shall do so on or before *Monday, March 22, 1976.* The case of any plaintiff above named who fails to comply within the time provided is hereby dismissed with prejudice for gross and inexcusable failure of timely prosecution of the action.

Those plaintiffs identified by defendants as filing late or untimely answers to defendants' class action interrogatories but not precluded by the Court from becoming class representatives, if class action is certified, are found not chargeable with inexcusable delay upon the showing made by them in their memoranda in response to defendants' motion to dismiss.

IT IS HEREBY SO ORDERED this 4th day of March, 1976.

GEORGE H. BOLDT
Sr. United States District Judge